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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JESUS GARCIA, Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether Petitioner is entitled to a jury trial in a Federal Employer's Liability Act action on the issue of the validity of a release where the special defense of accord and satisfaction has been asserted.

2. Whether an accord and satisfaction was reached by the parties as a matter of law.

3. Whether Petitioner's fundamental rights were abridged when Petitioner's counsel was denied the right to argue in opposition to a Motion in Limine.

LIST OF PARTLES

All of the parties appearing in the Supreme Court of the State of California are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

A Writ of Certiorari is respectfully sought to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The Memorandum of Decision rendered by the Superior Court of the State of California, Santa Clara County (Appendix A, infra, 1a-3a) found Petitioner to have authorized settlement of his claim. The

opinions of the Court of Appeal of the State of California, Sixth Appellate District (Appendix B, infra, 4a-34a) is not reported. The Order of the Supreme Court of the State of California (Appendix C, infra, 35a) denying Petitioner's Petition is not reported.

JURISDICTION

1. The Order of the Supreme Court of California was entered on April 18, 1985 (Appendix C, supra). It is final by its terms. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "In suits at common law,...the right of trial by jury shall be preserved."

45 U.S.C. Section 51, (Appendix D, infra, 36a) et seq. is entitled the Federal Employer's Liability Act. 45 U.S.C. Section 56 states in pertinent part:

> "....
>
> "Under this Chapter, an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the several states."

45 U.S.C. Section 55 states:

> "Any contract, rule, regulation, or device whatsoever, the purpose

or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

STATEMENT OF THE CASE

On November 16, 1977, JESUS GARCIA, a track laborer for SOUTHERN PACIFIC TRANSPORTATION COMPANY was injured while repairing cross ties near Richmond, California. (RT 170:10-174:16.) Mr. Garcia retained San Jose attorney, Heber Teerlink, to represent him in an action to recover damages against SOUTHERN PACIFIC TRANS-PORTATION COMPANY under the Federal Employer's Liability Act. (RT 84:4-19.)

SOUTHERN PACIFIC retained Attorney Robert Popelka to defend their interests and he undertook ordinary steps to prepare

his case for trial. Petitioner had been seen by a San Jose neurosurgeon, A. Stephen Genest, and a San Jose orthopedic surgeon, Michael Bluhm. Attorney Popelka arranged to have the depositions of both Drs. Genest and Bluhm taken as well as a Dr. Dennis who had previously treated Petitioner. At the time of the depositions, Petitioner's counsel did not attend nor did he arrange for anyone to be present to represent Garcia's interests. (RT 58:22-59:2.) Petitioner was complaining of a back injury and Attorney Popelka knew from Dr. Genest's testimony that Dr. Genest himself felt that there were indications suggestive of a disc herniation. (RT 53:2-54:3.) SOUTHERN PACIFIC learned through Dr. Genest's deposition that there was evidence of decreased sensation in the left lower extremity (RT 59:12-60:4), the left ankle jerk was decreased (RT 60:12-61:13), and that Dr. Genest had prescribed a back

brace for Petitioner (RT 65:19-23) and that furthermore, Petitioner was restricted in his work activities (RT 68:8-12).

Dr. Genest testified at the time of trial that he had performed an examination of GARCIA on February 28, 1979. (RT 202:8-12.) Dr. Genest rendered an opinion that Petitioner was suffering the effects of a left lumbar disc herniation. (RT 203:26-204:3.) Dr. Genest placed a 25 pound weight restriction on Petitioner (RT 204:21-23), prescribed a back brace (RT 204:24-205:1), and stated that continuation of heavy labor would be detrimental to Petitioner's health. (RT 205:16-20.)

Although the case in chief was set on the Court's trial calendar, the trial date was eventually vacated at the request of defense counsel Popelka because of the behavior of plaintiff's counsel, Heber Teerlink, and the case was eventually

transferred to the arbitration calendar. (RT 39:26-40:16.)

On the morning of May 14, 1980, when the case was set for arbitration, Attorney Popelka discussed the case with Attorney Teerlink and the figure of $10,000.00 was discussed as a possible settlement. (RT 41:6-44:9.) Attorney Popelka offered the sum of $10,000.00 on behalf of SOUTHERN PACIFIC TRANSPORTATION COMPANY, and after receiving communication from Attorney Teerlink that the amount had been accepted by plaintiff, sent a letter dated May 15, 1980 confirming the settlement. The letter stated that the case was to be settled for the amount of $10,000.00, was silent as to any liens or deductions, and furthermore, Attorney Popelka denied that he had knowledge of any lien being asserted in this particular case. (RT 38:20-39:1.)

Petitioner stated repeatedly at trial

he did not authorize Attorney Teerlink to settle the case for $10,000.00 (RT 194:24-195:11; 197:3-13; RT 198:8-199:1) and stated that he was very concerned that he would be fired if returned to the work environment at the time of settlement.

On May 14, 1980, Petitioner and his wife, Constance Garcia, attended a meeting with Attorney Teerlink at which time the $10,000.00 was mentioned. At that time, all of Attorney Teerlink's communications were through Mr. Garcia's wife since Petitioner was unable to properly communicate with him in the English language (RT 92:1-22; 97:3-12; and 107:17-108:10.) At the time of trial, Attorney Teerlink attempted to explain his conduct in the handling of the case by stating he had spoken with Dr. Genest by telephone regarding Petitioner's medical condition; (RT 86:7-18) however, this

fact was completely contradicted by Dr. Genest's statement that he had never spoken with Heber Teerlink regarding Petitioner's medical condition (RT 203:4-23). Attorney Teerlink did admit he had lost faith in Petitioner's case (RT 114:26-116:7) and that he had no witnesses available for the arbitration at the time scheduled. (RT 111:18-25.) Attorney Teerlink also stated that Petitioner may have been confused regarding whether or not a settlement was going to be entered into and that he did not feel that it was binding. (RT 108:15-111:3.)

Upon learning that Attorney Teerlink had agreed to a settlement of $10,000.00, plaintiff terminated Mr. Teerlink's services and retained another law firm to represent him. (RT 106:7-16.)

Following transmittal of the Popelka letter dated May 15, 1980, a document entitled "Employee's Release of All Claims"

was forwarded to Heber Teerlink for JESUS GARCIA's signature. That document reflects the proposal by SOUTHERN PACIFIC in which Petitioner was not to receive $10,000.00, but was, in fact, to receive a lesser sum because two deductions were to be subtracted from the $10,000.00 figure. The first deduction was in the amount of $375.00 to be paid to the Railroad Retirement Board and a further sum of $46.67 was to be deducted which was never explained by anyone representing SOUTHERN PACIFIC even though a representative of their Claims Department did testify at trial. A Mr. Wallace Papke, a SOUTHERN PACIFIC employee since 1956 who was Assistant General Claims Agent at the time of trial, stated the Release must be signed and without the signature, as far as SOUTHERN PACIFIC was concerned, there was, in fact, no settlement. (RT 233:15-25; 235:25-236:7.)

At the commencement of the trial on the issue of whether or not there had been a settlement, counsel for SOUTHERN PACIFIC made a motion for the first time to strike plaintiff's demand for a jury and requested that the case be tried to the Court. (RT of 2/9/82 - 2-13:6.) The Court ruled in SOUTHERN PACIFIC's favor and the case proceeded to trial before the Court.

At the commencement of the evidentiary hearing before the Court, SOUTHERN PACIFIC made a motion in limine to preclude evidence of Petitioner's medical condition subsequent to May 14, 1980. It was the position of Petitioner that insofar as Petitioner stated and his attorney, Heber Teerlink had admitted, Petitioner was still complaining of pain as of May 14, 1980. (RT 120:21-24.) Counsel argued such evidence would further substantiate Petitioner's position that he, in fact, would not

authorize a $10,000.00 settlement where his condition was worsening, and he was concerned about his ability to work and support his family in the future. The Trial Court, in granting SOUTHERN PACIFIC's motion, refused Petitioner's counsel an opportunity to argue Petitioner's position or to make an offer of proof of the type of evidence wished to be submitted. (RT 6:12-10:20.)

Petitioner JESUS GARCIA, a native of Mexico who speaks very little English, required the services of an interpreter during the entire proceedings (RT 149:12-150:4), and had to have his wife interpret his attorney's comments to him at the time of his meeting with him regarding settlement. Petitioner has been found to have expressly authorized a $10,000.00 settlement, which would act as a final release of all claims against SOUTHERN PACIFIC as a result of his on-the-job

injury of 1977. He now continues to suffer from that injury and is unable to work at his former job at the present time.

REASONS FOR GRANTING THE PETITION

I

PETITIONER IS ENTITLED TO A JURY TRIAL IN A FEDERAL EMPLOYER'S LIABILITY ACT ACTION ON THE ISSUE OF THE VALIDITY OF A RELEASE WHERE THE SPECIAL DEFENSE OF ACCORD AND SATISFACTION HAS BEEN ASSERTED

The validity of a release in a Federal Employer's Liability Act case is governed by federal not state law. (Maynard v. Durham & S. Ry. Co. [1961] 365 U.S. 160, 31 S.Ct. 561, 5 L.Ed.2d 486; Dice v. Akron, C. & Y. R.R. Co., [1952] 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 378.) Consistent with the policy favoring a nationally uniform application of the Federal Employer's Liability Act, issues of the validity of a release must be subjected to "special scrutiny" on policy grounds because a release purports to waive a

federally created private right. (See, e.g.: Barniger v. National Maritime Union, [S.D.N.Y., 1974] 372 F.Supp. 908, 914.)

Trial by jury of the issue as to whether a release has been obtained in a Federal Employer's Liability Act case is "part and parcel of the remedy afforded railroad workers under the Federal Employer's Liability Act." (Dice v. Akron & C. & Y. R.R. Co., supra, 342 U.S. 359, 363, quoting from Bailey v. Cent. Vt. R.R., [1943] 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.) A jury must decide the validity of the release because "to deprive railroad workers of the benefit of a jury trial where there is evidence of negligence is to take away a goodly portion of the relief which Congress has afforded them." (Dice v. Akron & C. & Y. R.R. Co., supra 342 U.S. 359, 363.)

Reliance by the Court of Appeals in the present case on Minneapolis and Sd. R. Co. v. Bombolis, (1916) 241 U.S. 211, as dispositive authority for the proposition that Petitioner was rightfully denied a jury trial on the issues of accord and satisfaction and compromise is misplaced. In Bombolis, the Defendant-Appellant had argued that the Seventh Amendment provided a constitutional mandate to all state courts that issues of liability be heard before a jury. Specifically it was contended that Ohio State Rule of Procedure which allowed five-sixths of a jury to constitute a unanimous verdict was unconstitutional. The United States Supreme Court disagreed. It held that the Seventh Amendment did not so apply and that the State Court was able to set its own rules governing the number of jurors needed to find liability. These are not similar facts nor similar contentions

in the instant case.

Petitioner reiterates the applicability of Dice v. Akron, C. & Y. R.R. Co., supra, 342 U.S. 359. In Dice, the state trial court was faced with a state procedural rule which allowed for jury fact-finding in negligence actions with one relevant exception: Where a release under the Federal Employer's Liability Act was challenged on the grounds of fraud, the court was to be the trier of fact. The United States Supreme Court specifically held Bombolis inapplicable because the State of Ohio had not abolished trial by jury on all issues of negligence. It found that the procedural rule which took away plaintiff's right to trial by jury was a denial of an important federal right under the Federal Employer's Liability Act. Accordingly, the Supreme Court struck down the rule and the plaintiff was permitted a jury trial on the issue

of whether or not he had validly waived his claim by way of a release. "It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a 'mere local rule of procedure' for denial in the manner that Ohio has here used." (Dice, supra, at 362; citing Brown v. Western R. Co., 338 U.S. 294.)

Dice dealt with a disputed release under the Federal Employer's Liability Act. Bombolis established broad judicial authority guidelines under the United States Constitution. Factually, the Dice case is much more pertinent. Analytically, Dice provides a much clearer discussion and resolution of the issue than does Bombolis. The trial court clearly erred in denying Mr. Garcia a trial by jury on all phases of his lawsuit.

Despite the foregoing, the California Court of Appeals held that "Dice did not

overrule or disapprove Bombolis." (Appendix B, p. 28a.) Additionally, the Court of Appeals stated:

> "Our view of the effect of Dice is not altered by our Supreme Court's interpretation of the case in Jehl v. Southern Pac. Co. (1967) 66 Cal.2d 821...The court, however, reached its conclusion while assuming that Dice had constructed a right to jury trial in an F.E.L.A. case, taking the view that such right emanated from the Federal Employer's Act itself rather than from the Seventh Amendment. (Id., at p. 834)...However, the court's assumption as it turned out, was not necessary as to the ultimate decision and may properly be considered dictum with which we may respectfully differ." (Appendix B, p. 29a-30a.)

It is Petitioner's contention that the Jehl case is on point and should not have been overlooked by the California Supreme Court and Court of Appeals in rendering such a decision. Furthermore, the United States Supreme Court has held that to withdraw from the jury the question of a release's validity is reversible error. (Callen v. Pennsylvania R.R. Co. [1947] 322 U.S. 625, 238, 68 S.Ct. 296, 92 L.Ed.

242, 245.)

Controversies over the validity of releases in Federal Employer's Liability Act actions are governed by 45 U.S.C. Section 55, supra, p. 3.

It has been said in reference to 45 U.S.C. Section 55 that this section "declares a public policy to void releases or other exculpatory devices procured under circumstances that indicate an attempt to avoid Federal Employer Liability Act liability." (Kozar v. Chesapeake & Oh. Ry. [W. Dist. Mich. 1970] 320 F.Supp. 335, 384-385, affirmed in part and vacated in part on other grounds, [6th Cir. 1971] 449 F.2d 1238.) Case law under this particular section of the Federal Employer's Liability Act demonstrates that where contract issues arise, for example where a release or compromise is challenged, the plaintiff is always entitled to a trial by jury.

Conflicting evidence as to whether money accepted by an injured railroad employee when he signed a release was wages or consideration for a release was a jury question. (Maynard v. Durham & S. Ry. Co. [1961] 365 U.S. 160, 81 S.Ct. 561, 5 L.Ed.2d 486.) Whether a release of a brakeman's claim under this chapter for back injuries was the result of mutual mistake was for the jury under the evidence. (Callen v. Pennsylvania Ry. Co. [C.C.A. Pa., 1947] 162 F.2d 832, affirmed 332 U.S. 625, 68 S.Ct. 296, 92 L.Ed. 242.) Whether or not an employee ratified a settlement for his injuries under this chapter was an initial fact for the jury. (Allison v. Chicago Great W. Ry. Co. [1954] 62 N.W.2d 374, 240 Minn. 547.) Whether an employee in signing a release knew that it was a release or believed that he was merely signing an application for the job was for the jury. (Johnson v. Elgin J & E.

Ry. Co. [1949] 87 N.E.2d 567, 338 Ill.App. 316.) Whether a release was executed pursuant to misrepresentations is a question for the jury. (Cratsley v. Pittsburg & L. E. R.R. Co. [D.C. Pa., 1967] 272 F.Supp. 330.)

In discussing a release in a Federal Employer's Liability Act case, the Ninth Circuit Court of Appeals held:

> "No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantages are connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitude of the contracting party is clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity." (Graham v. Atchison, Topeka & Santa Fe. Ry. Co. [9th Cir., 1949] 176 F.2d 819, 826.)

In the present matter, the lower court chose to affirm the argument of respondent in that the affirmative defense of compromise "invoked a proceeding in equity for which there was no right to trial by jury. We

agree." (Appendix B, p. 21a.) That court, and the California Supreme Court has ignored the history of cases as cited above.

II

THERE WAS NO ACCORD AND SATISFACTION REACHED BY THE PARTIES AS A MATTER OF LAW

SOUTHERN PACIFIC TRANSPORTATION COMPANY defended this lawsuit by alleging that the parties had reached an accord and satisfaction for $10,000.00, and because of this, Garcia was entitled only to that amount. The record is clear, however, that there was great controversy on the issue of whether or not an accord was ever reached. Moreover, the record is without contradiction that even with an accord, there was no satisfaction. It is precisely because of this that the case should be reversed.

When a party pleads the affirmative defense of accord and satisfaction, it assumes the burden of establishing that

defense. (Nemitz v. Norfolk & W. R.R. Co. [N.D. Ohio, 1968] 287 F.Supp. 221.)

It is a fundamental precept of contract law that an accord is not binding until there has been a satisfaction. (Harrison v. Gooden [1st Cir., 1971] 439 F.2d 1070; 6 A. Corbin, Contracts, §1269 [1962 Ed.] citing cases; 6 S. Williston, Contracts, §§1838, 1842-43 [rev. Ed. 1938]; Restatement of Contracts, §417 [a] [1932]; cf. Krock v. Electric Motor & Repair Co. [1st Cir., 1964] cert. denied 377 U.S. 934, 884 S.Ct. 1338, 12 L.Ed.2d 298.) An accord is "dependent upon complete performance before it operates as satisfaction of the original agreement." (J. A. Jones Construction Co. v. Greenbriar Shopping Centers [N. Dist. GA, 1971] 332 F.Supp. 1336, 1342; emphasis added.)

An accord and satisfaction is by definition an executory bilateral contract. (6 Corbin, §1268, Restatement, Contracts

§417; see generally, Gold, Executory Accords, 21 Boston U. L. Rev. 465 [1941]; Havinghurst, Reflections on the Executory Accord, in Perspective of Law; Essays for Austin Wakeman Scott 190 [1964].) It will only extinguish a prior obligation if both parties agree to exact terms which are in fact met. (See e.g., Calamari & Perillo, The Law of Contracts, [1977, 2d Ed.] §21-4, p. 761.)

Professor Corbin explained that an executory accord is "an agreement for the future discharge of an existing claim by substituted performance." (Corbin on Contracts, §1268, p. 71.) Further, "when the executory contract is fully performed as agreed, there is an accord and satisfaction and the previously existing claim is discharged." (op. cit., §1276, p. 115; emphasis added.) Critical to this Petition is the rule that "if the debtor breaks the executory

accord, the creditor has the alternative of enforcing the original duty or the subsequent contract. (DeVillers v. Atlas Corp. [10th Cir., 1966] 360 F.2d 292.)

An accord is an agreement, and unless the elements in an agreement are present, there can be no accord. (International Longshore & W.U. Local 34 v. Cargill, Inc. [N. Dist. Calif., 1974] 372 F.Supp. 807.) The record is clear that Mr. Garcia was unaware of the railroad lien for $375.00 or the unexplained $46.67 deficiency, both of which appeared as terms on the release finally sent to Mr. Teerlink's office. It is impossible for him to have agreed to terms that were never discussed with him. Therefore, since there was no "agreement," there was no accord.

The California Civil Code defines an accord as an "agreement to accept, in extinction of an obligation, something

different from or less than that to which the person agreeing to accept is entitled." (California Civil Code § 1521.) This Section was relied on by the court in International Longshore, supra, 372 F.Supp. 807, to dispel the attempted defense of accord and satisfaction. In that case, the offeree was to sign and return a release in response to an offer to settle a back pay labor dispute. The check which accompanied the release was deposited in a trust account for the offeree but the release was never signed nor returned. The Court said: "By failing to sign and return the acknowledgement, Mr. Jackson's offer was rejected, and therefore, the statutory requirement of an agreement in order to perfect accord and satisfaction was never reached." (International Longshore, supra, 372 F.Supp. 807, 811; see 1 Witkin, Summary of Calif. Law, Contracts, §704,

8th Ed., 1973; 1 Corbin, Contracts, (1963) §67 at 275.)

If Mr. Garcia had intended to be bound by the terms of the "agreement", including terms that were never discussed with him, he would not have immediately fired Mr. Teerlink and sought new counsel. "There can be no accord and satisfaction of a disputed claim unless the creditor accepts the lesser amount with the intention that it constituted settlement of the claim." (Vilter Mfg. Co. v. Rolaff [8th Cir., 1940] 110 F.2d 491, 498; Nemitz v. Norfolk & W. R.R. Co. [N. Dist. Ohio. W.D., 1968] affd. 92 S.Ct. 185, 404 U.S. 37, 30 L.Ed.2d 198, rehearing denied, 92 S.Ct. 668, 404 U.S. 1026, 30 L.Ed.2d 677.)

A case similar to the one at bar involved a situation where a client, prior to receiving payment in settlement of a claim, revoked his accord and his

attorney's authority to receive payment. The Circuit Court allowed the case to be reset for trial and found no accord and satisfaction existed. (Harrison v. Gooden [1st Cir., 1971] 439 F.2d 1070.)

In the Harrison case, a personal injury action, the defendant offered to settle the case for $15,000.00. The plaintiff, who at first appeared to be interested in the offer, subsequently changed his mind and would not settle the case for that sum nor would he sign the release. He discharged his attorney. Thereafter, the insurer forwarded a check to plaintiff's former attorney which the plaintiff never received.

At trial, the court found that equity and simple fairness required that the plaintiff be allowed to go ahead with his original complaint rather than allowing the defense of accord and

satisfaction to curtail his claim. On appeal, the Circuit Court decided that before the payment was received to complete the satisfaction, the plaintiff had revoked the accord and plaintiff's attorney's actual authority to receive payment.

In the present matter, the lower court upheld the trial court's finding that the oral agremeent and compromise of Garcia's claim was a separate and affirmative defense. The court did not take into consideration that SOUTHERN PACIFIC first raised the issue of accord and satisfaction, although later referred to such as irrelevant. Respondent placed complete reliance on the rules of compromise:

> "The concept of compromise and settlement is closely related to such other concepts as accord and satisfaction, novation, release, and account stated. In many situations these concepts have significantly overlapped one another; they have even been used synonymously and interchangeably; and there has been a semantic, but

no substantive, distinction between them. In some situations, however, the distinctions are of substantive significance."

"Any claim -- whether it is disputed, unliquidated, or undisputed and liquidated -- may be discharged by an accord and satisfaction, but only a disputed or unliquidated claim may be the basis for a compromise. Although there have been occasional efforts to treat compromise and settlement as a concept wholly distinct from accord and satisfaction, it appears that in substance, the only difference is that an accord may be based upon any type of claim, while a compromise may be based upon only a disputed or unliquidated claim. Thus, a compromise and settlement is essentially a subcategory of the more inclusive term 'accord and satisfaction,' and where a disputed or unliquidated claim is involved, it generally makes no practical difference whether the arrangement is referred to as a compromise and settlement or as an accord and satisfaction, except to the extent that local rules of pleading may require the use of one term rather than another." (15A Am.Jur.2d, §2, p. 774-775.)

III

PETITIONER'S FUNDAMENTAL RIGHTS WERE ABRIDGED WHEN PETITIONER'S COUNSEL WAS DENIED THE RIGHT TO ARGUE IN OPPOSITION TO A MOTION IN LIMINE

The trial began with defendant,

SOUTHERN PACIFIC TRANSPORTATION COMPANY making a motion in limine to exclude all evidence of Mr. Garcia's physical condition subsequent to May 14, 1980, the date of the alleged "settlement." Donald S. Britt, counsel for the Petitioner began his argument against this motion by attempting to show the relevancy of this evidence to the case. The Court refused to even discuss the evidence itself, making it difficult, if not impossible, to rule on its relevancy. Before Mr. Britt had a chance to develop any substantial argument, Bernard Allard, counsel for SOUTHERN PACIFIC TRANSPORTATION COMPANY interrupted and moved the court to curtail Mr. Britt's efforts.

Mr. Britt then attempted to make an offer of proof which was summarily refused. Mr. Britt again attempted to argue the motion on the grounds of relevancy but was instructed by the

Court that he would not be allowed to continue in any way and defendant's motion to exclude all evidence of the plaintiff's physicial condition subsequent to the alleged accord and satisfaction was formally granted.

That a lawyer has a right to argue his case is fundamental to American Jurisprudence. The agument that certain evidence is relevant must include a discussion of that evidence, otherwise it is impossible to weigh its probative value or the possible prejudicial nature of that evidence. It was not only Mr. Britt's right to discuss the evidence prior to the Court's ruling on relevancy, it was his duty.

> "An attorney has the duty to protect the interest of his client, and the right to press legitimate argument and to protest an erroneous ruling. He may assert that which he believes to be correct in a forthright manner, if he is acting in the due course of a judicial proceeding." (In re

Grossman [1972] 24 C.A.3d 624, 101 Cal. Rptr. 176.)

The California Supreme Court has made it clear that counsel should be given great latitutde in arguing its case. "In the leading case of Tucker v. Henniker, 41 NH 323, it is said, 'The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law...'" (People v. Molina [1899] 126 C.505, 508, 59 P.2d 34.)

Not only was it an abuse of discretion to refuse Mr. Britt's argument as to relevancy, the cases indicate that the evidence should have been admitted since the validity of a release was being challenged in a Federal Employer's Liability Act case.

> "In our judgment, the truth respecting the release can only be ascertained by considering the cause in its entirety, otherwise,

federal rights will be prejudiced." (Bowman v. Illinois Central R.R. Co. [Ill 1957] 140 N.E.2d 104, 120.)

Or, stated another way:

"And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitude of the contracting parties clearly shown." (Graham v. Atchison, Topeka & Santa Fe Ry. Co. [9th Cir., 1949] 176 F.2d 819, 826.)

IV

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the judgment of the California Supreme Court.

Respectfully submitted,

LEO M. O'CONNOR, INC.
A Professional Corporation

By LEO M. O'CONNOR
Leo M. O'Connor
Attorneys for Petitioner

APENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

JESUS GARCIA,

Plaintiff,

NO. 402955

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,

Defendants. /

MEMORANDUM OF DECISION

Plaintiff Jesus Garcia authorized setttlement of his claims vs. defendant Southern Pacific in the sum of $10,000. Judgment may be entered accordingly.

BRIEF DISCUSSION

An attorney may bind his client in all matters pertaining to the regular conduct of his case (Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal 2d 448, 460). There is, therefore, a rebutable presumption that an attorney has authority to comprise his client's action which he is prosecuting. (Id. at pp 460-461)

Settlements of disputes are favored by the law in the absence of fraud. (Cassin v. Financial Indemnity Co. (1958) 160 Cal.App.2d 631, 363).

In this case, the evidence indicates that both the issues of liability (despite the fact this is a FELA case) and the damages were in great controversy. Much is made of the fact that Mr. Teerlink was not on his best behavior in this lawsuit, nor did he have good communication with his client. However, it is clear that at the time of the arbitration hearing that Mr. Garcia had the settlement offer explained to him and on balancing the evidence that he understood and agreed to the settlement. The court is of the opinion that despite the claimed language barrier, Mr. Garcia is sufficiently knowledgeable in English to have understood and agreed to resolve his case for $10,000.

DATED: May 18, 1982.

/s/WILLIAM J. FERNANDEZ
WILLIAM J. FERNANDEZ
Judge of the Superior Court

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

JESUS GARCIA,

Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant and Respondent.

A018517

(Santa Clara County Super. Ct.No. 402955)

Plaintiff appeals from a judgment in his favor for $10,000. The basis for the judgment was the trial conclusion that plaintiff and defendant had settled plaintiff's personal injury suit for said amount. The suit had been brought against defendant under the Federal Employer's Liability Act (F.E.L.A.). (45 U.S.C. § 51, et seq.).

Defendant in its answer to plaintiff's

complaint, alleged, inter alia, the affirmative defense of an oral agreement of compromise.

The trial court granted bifurcation (Code Civ. Proc., § 517) and ordered that the affirmative defense issues be tried first, and to the court sitting without a jury.

Plaintiff contends he was erroneously denied a jury trial on the affirmative defense issues; that the evidence is insufficient to support the judgment; and that reversible error occurred in denying his counsel the opportunity to argue the admissibility of certain evidence.

Plaintiff's contentions are found to be without merit. The judgment will accordingly be affirmed.

The Evidence

Trial of the issue of settlement disclosed the following evidence:

Plaintiff claimed to have injured his back on November 16, 1977, while repairing cross-ties as an employee of defendant, Southern Pacific. He retained attorney Heber Teerlink to represent him and an action based on the Federal Employer's Liability Act was duly filed in the superior court on June 16, 1978. Plaintiff's theory of liability was grounded on defendant's failure to provide him with: a safe place to work, proper tools and equipment, proper supervision, and adequate assistance.

Plaintiff was examined by a number of physicians. The treating doctors diagnosed plaintiff's injury as a low back strain. Plaintiff's counsel arranged an examination by Dr. Geneso (sic), who found a possible herniated disc, but which predated the claimed work injury. Plaintiff was off work approximately 15 days due to the injury.

It may fairly be assumed, for purposes of the instant inquiry, that the issues of liability, and the nature and extent of plaintiff's injury, were in sharp dispute.

Plaintiff's case progressed through the superior court process but prior to trial was transferred to the arbitration calendar, where it was scheduled to be heard on May 14, 1980. Prior to commencement of the hearing on May 14, defense counsel offered plaintiff, through his counsel, $10,000 in settlement. Mr. Teerlink agreed to discuss the offer with plaintiff, and later in the morning reported to defense counsel that plaintiff wished to think it over during lunch.

Mr. Teerlink testified that he explained the offer to plaintiff and advised him that acceptance of the offer would end the lawsuit. Mr. Teerlink further testified that plaintiff decided to, and did, accept

the offer that afternoon. Teerlink then told defense counsel that the offer was accepted. Defense counsel sent Mr. Teerlink a confirming letter the next day.

Plaintiff testified that his attorney did discuss the settlement offer with him and his wife and advised him that settlement would end the lawsuit. He, however, emphatically denied acceptance of the offer. He testified, through an interpreter, that he communicated with Mr. Teerlink through his wife because he could not communicate with him in English. Plaintiff acknowledged that he spoke some English, that he had taken and passed community college courses in electricity, algebra, art and English, and that he conversed in English with his roadmaster at work.

Mr. Teerlink expressed concern that an explanation to plaintiff regarding the nonbinding nature of arbitration

might have affected plaintiff's understanding of the binding nature of the settlement. However, neither plaintiff nor his wife substantiated that particular concern in their testimony.

Sufficiency of the Evidence To Support the Judgment

The trial court, in its "Memorandum of Decision," filed on May 20, 1982, found that "[I]t is clear that at the time of the arbitration hearing that Mr. Garcia had the settlement offer explained to him and on balancing the evidence that he understood and agreed to the settlement."

Appellate review of a claim of insufficiency of the evidence is guided by the principle that the determination rests on whether any substantial evidence, contradicted or uncontradicted, supports the conclusion reached by the trier of fact. (Crawford v. Southern Pacific Co. (1935) 3 Cal.2d

427, 429.) All factual matters will be viewed most favorably to the prevailing party and all issues of credibility are likewise within the province of the trier of fact. (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925.) The appellate court must accept as true all evidence tending to establish the correctness of the finding as made, also taking into account all inferences which might reasonably have been thought by the fact finder to lead to the same conclusion. (Board of Education v. Jack M. (1977) 19 Cal.3d 691, 697.)

The judgment herein is supported by substantial evidence, including the testimony of plaintiff's counsel, Mr. Teerlink, that he explained the proposed settlement to plainitff, that plaintiff thought it over, accepted it, and the acceptance was communicated to defense counsel.

Plaintiff does not urge the insufficiency of the evidence in factual terms -- he rather argues that the evidence is legally insufficient to support a finding of "accord and satisfaction." But that is a nonissue. (Cf. Warner v. Rossignol (1st Cir. 1975) 513 F.2d 678, 683.) True, defendant alleged an "accord and satisfaction" as one of its affirmative defenses. But it also set up the "oral agreement and compromise of plaintiff's claim" as a separate affirmative defense. It was this latter defense which formed the basis for the trial court's judgment, and which the law and the evidence sustains.

In the case of Gregory v. Hamilton (1978) 77 Cal.App.3d 213, 221, wherein the defendant filed a motion for an order compelling enforcement of an oral compromise agreement, the court held: "[I]t is recognized that a compromise agreement operates as a merger and bar of all

preexisting claims and causes of action [citation] and is as binding and effective as a final judgment itself (Armstrong v. Sacramento Valley R. Co. (1919) 179 Cal. 648, 651 [178 P. 516])." (Ibid.)

The fact that the parties may have contemplated the signing of a written agreement of compromise does not affect the validity and enforceability of a prior oral agreement which embodies the essential terms of the settlement. (Kreling v. Walsh (1947) 77 Cal.App.2d 821, 834; Dominguez Estate Co. v. L. A. Turf Club (1953) 119 Cal.App.2d 530, 545.) Nor may a settlement agreement be set aside by proof of an erroneous assessment of the original claim. (A. J. Industries, Inc. v. Ver Halen (1977) 75 Cal.App.3d 751, 750.)

Plaintiff contends that noncompliance with section 283 of the Code of Civil Procedure precluded the finding that

plaintiff had entered into a settlement. Section 283 provides: "An attorney and counselor shall have authority: [¶] 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; . . . ." Section 283 is inapplicable to the issue at hand. Its purpose is to control counsel's inherent authority to stipulate on matters of procedure. An attorney's authority to settle the client's lawsuit surely does not rest on his or her mere recital of the settlement on the court record. The client's consent to settlement is essential, aside from any authority which the attorney may possess incident to his retention. Linsk v. Linsk (1969) 70 Cal.2d 272, 276-277, interprets the section as follows: "Section 283 of the Code of Civil Procedure provides that an attorney may bind his client

'in any of the steps of an action or proceeding.' The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself. (Gagnon Co., Inc. v. Nevada Desert Inn, Inc. (1955) 45 Cal.2d 448, 460 [289 P.2d 466] [fn. omitted]; Zurich Gen. Acc. & Liab. Ins. Co., Ltd. v. Kinsler (1938) 12 Cal.2d 98, 105-106 [81 P.2d 913]; Duffy v. Griffith Co. (1962) 206 Cal.App.2d 780, 790 [24 Cal.Rptr. 161].) The extent of an attorney's powers in this regard has been aptly described as follows: 'In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority

to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.' (Armstrong v. Brown (1936) 12 Cal.App.2d 22, 28 [54 P.2d 118].)" (Emphasis added.)

The issue in this case is whether plaintiff's attorney had plaintiff's express consent to accept defendant's offer. Compliance with section 283 would have added little or nothing to the resolution of that issue, unless plaintiff's consent was directly entered in the record, which section 283 does not require in any event.

Plaintiff relies on Estate of Cattalini (1979) 97 Cal.App.3d 366, for the proposition

that noncompliance with section 283 precludes a finding of settlement when a party disputes the alleged stipulation. That case, however, is inapposite. First, the issue there was whether a stipulation had been entered into in the first place -- not whether the client had authorized it; and second, the stipulation claimed was that the trial court could divide a commission between contending brokers on a reasonable basis. As such, the stipulation pertained to a "[step] of an action or proceeding," was procedural in nature, and thus fell squarely within the contemplation of section 283.

A factually related case is Kreling v. Walsh, supra, 77 Cal.App.2d 821, where, as in the instant case, the issue was whether the client had consented to the disputed settlement. The court found noncompliance with section 283 to be irrelevant, saying, "The terms of the

agreement having been agreed upon by appellant, and his counsel having merely prepared the written memorandum thereof, the question of the attorney's authority to act for appellant, under the provisions of section 283 of the Code of Civil Procedure are not involved in this appeal. Whatever substantial rights were surrendered by appellant were given up by him voluntarily, and his attorney acted only as directed by him which appellant had agreed." (Id., at p. 834.) Here, as in Kreling, the role of plaintiff's attorney was to convey plaintiff's acceptance of the offer to counsel for the opposing party. He did not purport to settle the case under any inherent authority vested in him as the attorney for the plaintiff.

We therefore conclude that entry of the settlement in the court record was not required to make the settlement

effective.[1/]

Plaintiff further contends that the alleged settlement for $10,000 was ineffectual because defendant subsequently mailed him a written release for signature which provided for deduction of a "lien" for benefits paid by the Railroad Retirement Board in the amount of $421.67. Plaintiff argues that he did not agree to the deduction and the settlement was thus invalid. He relies on Greyhound Lines, Inc. v. Superior Court (1979) 98 Cal.App.3d 604. That case, however, is factually different. The agremeent in Greyhound was found, by the trial court, to have been expressly conditioned on the plaintiff signing the release. The release contained a hold harmless clause which had not been agreed to. Thus, the plaintiff could

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1/ Compare Code of Civil Procedure section 664.6, whereby judgment upon an agreed settlement may be entered on motion if the stipulation is in writing or entered into orally before the court.

not "'be held to the terms of a bargain to which she did not agree.'" (Id., at p. 607.)

The trial court, in the case before us, found that the agreement was complete as orally made, provided for payment of $10,000 to plaintiff, and entered judgment in his favor for that amount without reduction. Defendant's unauthorized attempt to deduct amounts paid by the Railroad Board was thus implicitly held to be contrary to the contract previously made. The record does not disclose whether defendant's tender of the reduced amount was in response to a lien of record, a contractual lien, a request of the Railroad Board for payment, or simply the result of a mistake. Counsel for defendant acknowledged at trial that the settlement did not contemplate the payment of any "lien" from the figure agreed upon. We are presented with no

authority providing that the tender of less than the full amount, under these circumstances, nullifies the contract.

We find this contention of plaintiff to be without merit.

The Right to Trial by Jury

Plaintiff does not quarrel with the court's order that the affirmative defenses be tried first. His complaint is that he was deprived of a jury trial which, he contends, is guaranteed for the trial of cases brought under F.E.L.A., including trial of the preliminary issue whether the parties had entered into an agremeent of compromise.

An employee with a cause of action under the F.E.L.A. may elect to bring the action in a state court, since state and federal courts have concurrent jurisdiction over such actions. A state which gives its courts jurisdiction over common law actions for negligence may not deny access

its courts for a negligence action founded on the Federal Employer's Liability Act. (Mondou v. New York, N.H. & H. R. Co. (1912) 223 U.S. 1.)

Whether the action is brought in a state or federal court, substantive rights are to be determined under federal law. Whether the action is barred by a prior compromise is a substantive issue. "Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. [Citation.] Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law." (Dice v. Akron, Canton & Youngstown R. Co. (1952) 342 U.S. 359, 361-362.)

Federal law, however, does not require a state to provide a jury trial for actions brought under the F.E.L.A. That proposition

was settled by the United States Supreme Court in 1916 (Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211; accord Chesapeake & Ohio Ry. Co. v. Carnahan (1916) 241 U.S. 241, 242).

Bombolis reasoned that the Seventh amendment to the United States Constitution, which guarantees trial by jury in federal courts, is inapplicable to the states (id., at p. 597) and that while a state court is required to apply federal substantive law in the determination of rights conferred under the F.E.L.A., the mode of trial, i.e., whether by jury, or court without a jury, may not be similarly controlled. (Id., at pp. 597-598.) Bombolis dealt with a Minnesota law permitting a verdict by a nonunanimous jury -- in contrast to the unanimous verdict required by federal law. Its holding and reasoning, however, clearly observe the propriety of nonjury trials of F.E.L.A. cases in

a state court, to the extent, of course, that the same nonjury trials are employed by the state for all common law negligence cases.

Plaintiff, however, points out the Supreme Court's decision, 37 years later, in Dice v. Akron, Canton & Youngstown R. Co., supra, 342 U.S. 359, which distinguished Bombolis in the context of a state trial procedure which the court apparently viewed as having adversely affected the injured employee's basic substantive rights under the F.E.L.A.

The employee's F.E.L.A. action in Dice alleged injury resulting from the employer's negligence; but the employee had signed a release which purported to bar his cause of action. He claimed the release was void due to the fraudulent misrepresentations of his employer as to its content -- that it was merely a receipt for back wages. The case was

tried to a jury which sustained plaintiff's fraud contention as to the release and returned a verdict in his favor for $25,000. However, the trial judge reappraised the evidence as to fraud, set the verdict aside, and rendered judgment for the employer, finding that the release had been valid. The Ohio Supreme Court affirmed.

The United States Supreme Court, in its review of the case, first determined that the trial judge and the Ohio Supreme Court had erred in applying Ohio, rather than federal, substantive law in determining the validity of the release. The release was invalid under federal law. Second, the Supreme Court disapproved of the Ohio procedural law which, in a jury trial, delegated part of the factual determinations of the issue of fraud to the judge and part to the jury. The high court's reasoning is best illustrated by the following excerpt from its opinion:

"Ohio provides and has here accorded petitioner the usual jury trial of factual issues relating to negligence. But Ohio treats factual questions of fraudulent releases differently. It permits the judge trying a negligence case to resolve all factum.' The factual issue of fraud is thus split into fragments, some to be determined by the judge, others by the jury. [¶] It is contended that since a state may consistently with the Federal Constitution provide a trial of cases under the Act by a nonunanimous verdict, Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S.211, 37 S.Ct. 595, 60 L.Ed. 961, Ohio may lawfully elminate trial by jury as to one phase of fraud while allowing jury trial as to all other issues raised. The Bombolis case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act.

But Ohio has not done this. It has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury. Compare Testa v. Katt, 330 U.S.386, 67 S.Ct. 810, 91 L.Ed. 967.

"We have previously held that 'The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence"' and that it is 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.' Bailey v. Central Vermont R. Co., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to

trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. Brown v. Western R. Co., 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100. [¶[The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor." (Id., at pp. 362-363.) (Emphasis added.)

In our view, Dice, supra, 342 U.S. 359, does not hold that a state must afford a jury trial to a F.E.L.A. litigant. Nor is there any feature of the applicable California procedure, discussed below, which should invoke the disapproval of Dice.

We reach this conclusion in light of the following considerations: Dice did not overrule or disapprove Bombolis' implicit holding that a state may properly deny a jury trial as to all issues. The thrust of Dice's disfavor appears to bedetermined by the judge, others by the jury." (Id., at p. 363.) The court noted that Ohio purported to provide trial by jury for cases arising under the federal Act but it disdained the judge's intervention "in taking away petitioner's verdict when the issue of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor."[2/] (Ibid.)

The Dice decision, we conclude, must be reserved for application to the type of trial procedure which the Supreme Court there viewed as a peculiar infringement

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2/ Please see following page.

on the employee's rights.

Our view of the effect of Dice is not altered by our Supreme Court's interpretation of the case in Jehl v. Southern Pac. Co. (1967) 66 Cal.2d 821. The court held in Jehl that additur was not precluded in a state-tried F.E.L.A. case stating, "[a]dditur does not deprive a plaintiff of the right to go to the jury on any issue or impair the substance of the right to trial by jury." (Id., at p. 835.) The court, however, reached its conclusion while assuming that Dice had constructed a right to jury trial in an F.E.L.A. case, taking the view

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2/ It is interesting to note, although not discussed by the Supreme Court, that the jury's finding may well have been fraud in the factum, a jury issue under Ohio law. The employee's contention in Dice -- he was told the document was a receipt -- was an allegation of fraud in the factum, at least under California law. (See 1 Witkin, Summary of Cal. Law, (8th ed. 1973), § 322, pp. 270-271.

that such right emanated from the Federal Employer's Act itself rather than from the Seventh Amendment. (Id., at p. 834.) Clearly, our Supreme Court engaged in a careful analysis of Dice and we are not unmindful of its import. However, the court's assumption, as it turned out, was not necessary to the ultimate decision and may properly be considered dictum with which we respectfully differ. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, & 676, pp. 4589-4591, and cases collected.)

Trial Under California Law

The trial court in the instant case implicitly found that the affirmative defense of compromise, as alleged by the defendant, invoked a proceeding in equity for which there was no right to trial by jury. We agree.

A compromise settlement is a contract and, as such, may be the subject of an action for specific performance. (Armstrong

v. Sacramento Valley R. Co. (1919) 179 Cal. 648, 650; County of Los Angeles v. Law Bldg. Corp. (1967) 254 Cal.App.2d 848, 853-854.) The action may be brought by cross-complaint in the very action which was allegedly compromised. (Cf. Silver v. Shemanski (1949) 89 Cal.App.2d 520, 529-531.)

California provides trial by jury in those civil proceedings for which trial by jury was afforded at common law. (Cal. Const., art. I, § 16; Code Civ. Proc., § 592.) That category does not include actions for specific performance of an oral agreement (Hartman v. Burford (1966) 242 Cal.App.2d 268) including compromise agreements. (Gregory v. Hamilton, supra, 77 Cal.App.3d 213, 219-220.)

The rule is similar under federal law. Actions for specific performance in the federal courts are matters for the court -- not the jury. (Warner v.

Rossignol, supra, 513 F.2d 678, 683-684.)

The trial court's ruling that plaintiff was not entitled to a jury trial on this issue was correct.

Foreclosure of Argument

Plaintiff contends that his attorney was not permitted to argue in opposition to a motion by defendant to exclude evidence concerning plaintiff's physical condition and the medical treatment he received following the date of the settlement. The record belies this contention. It is true that the court ruled on the motion abruptly as soon as the issue was understood and after counsel for plaintiff recited the relevancy of the proferred evidence. Counsel's concern that the trial court did not understand the relevancy of the evidence is evident for counsel continued to address the point after the court had ruled.

Counsel obviously disagreed with the court's ruling on the motion *in limine* but such disagreement should not be converted into a contention that the court would not listen. We find it significant in that connection, that plaintiff does not now challenge the correctness of the court's ruling on the motion *in limine*.

We find no abuse of the court's discretion in limiting counsel's argument.

The judgment is affirmed.

Agliano, J.

WE CONCUR:

Panelli, P.J.

Brauer, J.

Garcia v. So. Pacific Trans. Co.
A018517

APPENDIX C

BEST AVAILABLE COPY

CLERK'S OFFICE, SUPREME COUT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 18 1985

I have this day filed Order

HEARING DENIED Bird, C.J., Mosk, J.
Lucas, J. OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: JESUS GARCIA *No.* A018517

SOUTHERN PACIFIC TRANSPORATION CO.

Respectfully,

Clerk

APPENDIX D

45 U.S.C. Section 51 provides:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

CERTIFICATE OF SERVICE

I, the undersigned say: I am and was all times herein mentioned a citizen of the United States employed in the County of Sacramento, State of California, over the age of 18 years and not a party to the within action; I am employed in the office of a member of the bar of this court at whose direction service was made and my business address is 629 J Street, Third Floor, Sacramento, California 95814. on July 11, 1985, I served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of California on the defendant of said action by placing three true copies thereof in an envelope addressed to the attorney of record of said party at the office address of said attorney as follows:

Bruce Nye, Esq.
Popelka, Allard, McCowan & Jones
601 Montgomery Street, Ste. 2022
San Francisco, CA 49111

and by then sealing said envelope and depositing the same with postage thereon fully paid in the United States Mail at Sacramento, California, where is located the office of the attorney for the person by and for whom service has been made.

There is delivery service of the United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California on July 11, 1985.

Patricia J. Haney